

PART IV

GENERAL TERMS & CONDITIONS

CONTENTS

1.	Definitions	2
2.	Services to be Provided	3
3.	Supplier's Acknowledgement	4
4.	Conduct of the Work	4
5.	Appointment and Replacement of the Supplier's Employee	4
6.	Supplier's Representatives	5
7.	Location Preparation	5
8.	Acceptance Certificates	5
9.	Intellectual Property Rights	5
10.	Terms of Payment	6
11.	Training	6
12.	Confidentiality	6
13.	Independent Supplier	8
14.	Offering Gratuities	8
15.	Assignment	8
16.	Indemnities	8
17.	Publicity	9
18.	Termination of the Contract	9
19.	Effect of Termination	10
20.	Service of Notice	11
21.	Disputes Resolution	11
22.	Waiver	11
23.	Severability	11
24.	Entire Agreement	11
25.	Software Asset Management	11
26.	Execution of Further Documents	12

1. Definitions

1.1 In this Contract, unless the context otherwise requires, the following expressions are assigned the following meanings:

“Centre Completion Date”	means the date when the Supplier’s facilities is ready for ITRC systems to relocate in accordance with the provision of this Contract.
“Contract”	means the agreement concluded between the ITRC and the Supplier, including the Articles of Agreement, General Conditions of Contract of this Part, Contract Schedules, specifications, plans, drawings and other documents which are incorporated by reference herein.
“Costs”	Means initial cost and recurrent cost
“Documentation”	means the operating manuals, user instructions, technical literature and all other related materials in human-readable form supplied to ITRC by the Supplier for aiding the use of data centre service.
“Intellectual Property Rights”	means patents, trade marks, service marks, trade names, copyright, domain names, rights in know-how, new inventions, designs or processes and other intellectual property rights (of whatever nature and wherever arising) in each case whether registered or unregistered and including applications for the grant of any such rights.
“Maintenance Services”	means the maintenance services to be provided by the Supplier after project completion.
“Performance Criteria”	means the performance criteria of the data centre.
“person”	includes any body of persons, corporate or unincorporated.
“Price”	means the aggregate price for the System and the Work to be carried out by the Supplier hereunder and the Licence Fee.
“Project Plan”	means the time schedule and sequence of events for the performance of this Contract or such other project plan as may be agreed by the parties of this contract.

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| “Project Completion Date” | means the date specified in the Project Plan by which the Supplier is to assist ITRC to finish the relocation and the IT Systems Ready for Use. |
| “Project Specification” | means the specifications which set out the requirements of the System as specified in Project Specification |
| “Project Services” | means the project services to be provided by the Supplier. It shall include, but not limited to, coordination of relocation. |
| “Reliability Levels” | means the Committed Serviceability Level and the Committed Mean Time Between Failure. |
| “Supplier” | means the person who by the Contract undertakes to supply, install and commission the System and to provide services to ITRC. |
| “Work” | means all the works, duties and obligations to be carried out by the Supplier pursuant to the provisions of this Contract. |
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- 1.2 Where the Context so admits references to the expression “Supplier” shall include the Supplier’s employees, agents, consultants and sub-Supplier.
- 1.3 Each gender includes the others and vice versa.
- 1.4 The singular includes the plural and vice versa.
- 1.5 Reference to any enactment, ordinance, order, regulation or other similar instrument shall be construed as a reference to the enactment, ordinance, order, regulation or instrument as amended by any subsequent enactment, ordinance, order, regulation or instrument.
- 1.6 The heading to the Clauses of this Contract is for ease of reference only and shall not affect the interpretation or construction of this Contract.

2. Services to be Provided

The Supplier hereby agrees to:-

- 2.1 provide the Data Centre facilities and other related services; and
 - 2.2 provide other services hereinafter described;
- on the terms and conditions herein contained.

3. Supplier's Acknowledgement

The Supplier acknowledges it has been supplied with sufficient information to enable it to supply to ITRC the data centre which complies fully with the requirements set out in the Specification and in the provisions of this Contract. The Supplier shall not be entitled to any additional payment nor be excused from any liability under this Contract as a consequence of any misinterpretation by the Supplier of any matter or fact relating to the Specification, the said requirements or any other provisions of this Contract.

4. Conduct of the Work

- 4.1 The Supplier shall carry out the Work with all due and reasonable diligence and despatch.
- 4.2 The Supplier shall, through the Representative, keep ITRC informed on all matters related to the Work within the knowledge of the Supplier and shall answer all reasonable enquiries received from ITRC Representative.
- 4.3 The Supplier shall, if reasonably practicable, attend all meetings convened by the ITRC Representative to which it may be summoned and shall advise and assist ITRC on all matters relating to the duties and obligations it has assumed under this Contract.
- 4.4 All material supplied to the Supplier by ITRC for the purpose of this Contract shall remain the property of ITRC and shall be returned in reasonable condition on or before the Completion Date as applicable.

5. Appointment and Replacement of the Supplier's Employee

- 5.1 The Supplier shall appoint the Supplier's Employee to undertake such part of the Work as submitted by Supplier.
- 5.2 The Supplier's Employee shall not be replaced unless prior written approval has been given by the ITRC Representative.
- 5.3 The appointment or replacement of any Supplier's Employee to undertake any part of the Work shall not relieve the Supplier from any liability or obligation under this Contract and the Supplier shall be responsible for the acts, omissions, defaults and neglects of any of his Supplier's Employee, agents, servants or workmen as fully as if they were the acts, omissions, defaults or neglects of the Supplier.
- 5.4 The Supplier warrants that the Supplier's Employee possesses the minimum qualifications and experience required for the work.
- 5.5 The Supplier warrants that the Work shall be performed and completed in a professional manner and that the Supplier, the Supplier's Employee and any person employed or engaged by it and any sub-Supplier of the Supplier or person concerned with the same shall use all necessary skill, care and diligence in the discharge of the duties.

6. Supplier's Representatives

- 6.1 If any of the Supplier's representatives or Supplier's Employee employed on the Contract is found in the opinion of the ITRC Representative to be incompetent or inattentive or to conduct himself improperly, the ITRC Representative shall have the power to require his removal forthwith by giving notice to the Supplier and to require that an attentive and competent Supplier's Employee of proper conduct be appointed in his stead. The Supplier shall forthwith comply with such requirements.
- 6.2 The Supplier is required to appoint a project manager and deputy within its organisation who will have the responsibility and commensurate authority for the overall progress of the Work and to whom all questions regarding the Contract can be referred.

7. Location Preparation

- 7.1 The Supplier shall prepare the ITRC Data Centre, and provide such environmental and operational conditions as proposed by Supplier, prior to installation. Upon notification of completion of the preparation of the ITRC Data Centre, ITRC shall inspect, specify all necessary modifications (if any) and ultimately approve in writing the preparation of the ITRC Data Centre.

8. Acceptance Certificates

- 8.1 When the ITRC IT Systems have passed the System installation test in the Supplier's data centre, ITRC, within 21 days thereafter, either:-
- 8.1.1 accepts the Data Centre or any part thereof by issuing an Acceptance Certificate to the Supplier; or
- 8.1.2 give instructions in writing to the Supplier specifying all the work which is required to be done by the Supplier under this Contract before such Acceptance Certificate can be issued, in which case the Supplier shall not make any further request for such Acceptance Certificate until such work is completed to the satisfaction of the Representative.

9. Intellectual Property Rights

- 9.1 The Supplier agrees and undertakes that:-
- 9.1.1 Any and all Intellectual Property Rights in the Specification, the Documentation (but excluding any pre-existing operating manuals users instructions and other pre-existing documentation solely relating to the Software and the Hardware), and all other things and materials developed by the Supplier under this Contract are and shall be the sole and exclusive property of ITRC and shall be and remain vested in ITRC immediately upon creation but to the extent that any such rights do not vest in ITRC either by operation of law or automatically by virtue of this Contract the Supplier shall hold such rights on trust for ITRC. The Supplier will not at any time whether before during or after the completion, expiry or termination of the Contract (howsoever occasioned) in any way question or dispute the ownership of ITRC.

- 9.1.2 Upon request by ITRC and/or in the event of the expiration or termination (howsoever occurred) of this Contract, the Supplier shall at its sole costs and expense promptly deliver to ITRC all copies (including the original) of the items described in this document and in the Supplier's custody control or possession.
- 9.1.3 The Supplier hereby waives and undertakes to obtain the waiver of its employees, consultants, sub-Suppliers and agents waiving all moral rights (whether past present or future) in the items described in document and any other things and materials in which the Intellectual Property Rights either have been or will be assigned to the ITRC under this document or elsewhere in this Contract.
- 9.2 The Supplier shall ensure no person involved or engaged in the performance of the Work has or expect to have any claim to the items described in document excluding operating manuals users instructions and or any Intellectual Property Rights (whether past present or future) therein or any other things and materials in which the Intellectual Property Rights (whether past present or future) either have been or will be assigned to the ITRC under this Contract.

10. Terms of Payment

- 10.1 Payment will be made on a monthly basis.
- 10.2 Any payment payable by the ITRC hereunder will be paid within 45 days after any such payment becomes payable and the receipt by ITRC of the Supplier's invoice therefor.
- 10.3 All invoices and correspondence concerning payment should be addressed to
- Deputy General Manager, ITRC,
The Hong Kong Council of Social Service,
Room 1102, 11/F, Duke of Windsor Social Service Building,
15 Hennessy Road,
Wanchai, Hong Kong.

ITRC shall not be held responsible for any delay in payment if invoices and correspondence are not so addressed.

11. Training

- 11.1 Any necessary training required by ITRC shall be provided by the Supplier in accordance with the charges which are agreed by ITRC and the Supplier.

12. Confidentiality

- 12.1 The Supplier shall treat as proprietary and confidential all information, drawings, specifications, documents, contracts, design materials and all other data (including without limitation any personal particulars records and Personal Data (as defined in the Personal Data (Privacy) Ordinance (Cap 486)) and materials of any nature (in or on whatever media)) accessible by the Supplier under this Contract or which ITRC has in anticipation of, for the purpose of or in the course of performing this Contract (whether

- directly or indirectly) disclosed supplied made available or communicated to the Supplier which ITRC has designated as confidential or which is by its nature clearly confidential **PROVIDED THAT** this document shall not extend to any information which was rightfully in the possession of the Supplier prior to the commencement of the negotiations leading to this Contract or which is already in the public domain or becomes so at a future date (otherwise than as a result of a breach of this Clause).
- 12.2 The Supplier shall indemnify and keep ITRC and its employees and authorised persons fully and effectively indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature arising from or incurred by reason of any actions and/or claims made in respect of information subject to the Personal Data (Privacy) Ordinance (Cap 486)) which action and/or claim would not have arisen but for the negligence or omission of the Supplier, any of its employees, associates sub-Suppliers consultants or agents (or any one acting on its/their behalf) in connection with the provision or receipt of the Work or services provided under this Contract.
- 12.3 The Supplier hereby agrees that it will use the confidential information described in this document solely for the purposes of this Contract and that it will not, at all time whether during or after the completion, expiry or termination (howsoever occasioned) of this Contract whether directly or indirectly disclose or divulge the same, allow to be disclosed or divulged, use or allow to be used the same for any other purposes, to any person (except to the Supplier's own employees and then only to those employees who need to know the same in connection with the performance of the Supplier's obligations under this Contract) without the ITRC's prior written consent and shall use its best endeavours to prevent any such disclosure thereof.
- 12.4 The Supplier undertakes to take all necessary security measures for the protection of the information, documentation and materials which it is obliged by this document to keep secret and treat as confidential.
- 12.5 The Supplier shall ensure that each of its employees agents associates sub-Suppliers consultants and any other persons engaged or employed by the Supplier in connection with this Contract are aware of and comply with the provisions of this document and the Official Secrets Ordinance (Cap 521) and the Supplier shall indemnify and keep ITRC fully and effectively indemnified against all actions, costs (including without limitation the fees disbursements of lawyers agents witness and expert witnesses), claims, demands, expenses, loss, damage and liabilities whatsoever which ITRC may suffer incur or sustain as a result of any breach of confidence (whether under this contract or at law) by any such persons.
- 12.6 The Supplier undertakes, if so requested by ITRC, to sign ITRC's separate confidentiality agreement in a form prescribed by ITRC and to procure each of its employees agents associates sub-Suppliers and consultants to whom any confidential information requires to be disclosed to do so.
- 12.7 The Supplier further agrees that it will not at all time itself or through any subsidiary or agent use, sell, license, sub-license, create, develop or otherwise deal in any confidential information supplied to it by the ITRC or obtained by it while performing this Contract.
- 12.8 The Supplier shall promptly notify the ITRC and give ITRC all reasonable assistance in connection with any proceedings which ITRC may institute against any such persons pursuant to any of the provisions in this document.

- 12.9 The provisions of this document shall survive the termination of this Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such termination.

13. Independent Supplier

- 13.1 For the purpose of the Work to be performed under the Contract, the Supplier is an independent Supplier. The Supplier is not an agent or a partner of ITRC and has no power to bind the ITRC to any obligation or whatsoever.
- 13.2 The Supplier shall have complete control of the Work and it shall efficiently direct and supervise the Work with its best endeavour.

14. Offering Gratuities

If the Supplier, its employees and agents or any one of them offer or give or shall be found to have offered or given any advantage, gratuity, bonus, discount, bribe or loan of any kind or in kind in whatever form to any employee or agent of the ITRC (disregarding whether a criminal offence was committed under the Prevention of Bribery Ordinance or any law of such similar nature), the ITRC shall be at liberty forthwith to terminate the Contract and to hold the Supplier liable for all losses damages costs and expenses howsoever incurred or sustained by ITRC.

15. Assignment

The Supplier shall not assign or otherwise transfer this Contract or any of its rights and obligations hereunder whether in whole or in part without the prior written consent of ITRC.

16. Indemnities

- 16.1 The Supplier shall indemnify ITRC and keep ITRC fully and effectively indemnified against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Supplier, its employees, agents or sub-Suppliers or by any defect in the design, material, workmanship or installation of the System.
- 16.2 The Supplier shall indemnify ITRC and keep ITRC fully and effectively indemnified against all actions costs claims demands expenses (including without limitation the fees and disbursements of lawyers agents and expert witnesses) damages and any awards compensation and costs which may be agreed to be paid in settlement of any proceedings (where that settlement has first been proposed or approved in writing by/on behalf of the Supplier) and liabilities of whatsoever nature arising out of or in connection with any allegation and/or claim of data centre service and/or the any items described in document or the use possession or operation of them by ITRC and its employees and authorised users assigns or successors-in-title infringes any Intellectual Property Rights of any third party, subject to the following conditions:-

- 16.2.1 ITRC shall as soon as reasonably practicable notify the Supplier in writing of any allegations of infringement of which it has been notified and will not make any admissions without the Supplier's prior written consent;
- 16.2.2 ITRC, at the Supplier's request costs and expense, shall allow the Supplier to conduct and/or settle all mediation, conciliation, arbitration and litigation resulting from any such claim;
- 16.2.3 ITRC shall, at the request of the Supplier, afford all reasonable assistance with such negotiations or litigation, and shall be reimbursed by the Supplier for any costs and expenses incurred in so doing.
- 16.3 If ITRC's employees and authorised users' use, operation of the data centre is or becomes infringing or where an injunction restraining use operation or possession by ITRC's employees and authorised users of the data centre is in the opinion of the ITRC's legal adviser to be likely to be granted by the court to a third party alleging infringement of its Intellectual Property Rights, the Supplier shall at its own costs and expenses and without prejudice to any other the ITRC's rights or remedies may have, promptly and at its own expense:-
 - 16.3.1 Procure for ITRC all the necessary rights to continue using the data centre for all (or any one or more) of the purposes contemplated by this Contract all upon the same terms and conditions of this Contract; or
 - 16.3.2 Adapt modify or replace the infringing part(s) (but without detracting from the overall performance of the System) so as to avoid any infringement (in which event the Supplier shall compensate ITRC for the amount of any loss and/or damage sustained or incurred by ITRC during such adaptation modification or replacement) PROVIDED however that any change in the data centre (or any part(s) thereof) must first be approved by ITRC in writing and be subject to the same acceptance testing as specified in this Contract and on same terms and conditions of this Contract; or

17. Publicity

The Supplier shall submit to ITRC all advertising or other publicity material relating to the Contract or other work done in connection with the Contract wherein ITRC's name and/or its parent entity's name are/is mentioned or language used from which a connection with ITRC can reasonably be inferred or implied. The Supplier shall not publish or use any such advertising or other publicity material without the prior written consent of ITRC.

18. Termination of the Contract

- 18.1 This Contract may be terminated forthwith by ITRC on giving notice in writing to the Supplier if the Supplier, being a company, shall have a receiver or liquidator appointed or shall pass a resolution for winding-up (otherwise than for the purpose of amalgamation or reconstruction) or a court shall make an order to that effect or being a partnership shall be dissolved or being an individual shall commit any act of bankruptcy or shall die or if the Supplier (whether a company or not) shall enter into any composition or arrangement with its creditors or shall become insolvent.
- 18.2 Any termination shall discharge the parties from any liability for further performance of this Contract and shall entitle the ITRC to be repaid forthwith all sums previously paid

under this Contract (whether paid by way of deposit or otherwise) and to recover from the Supplier the amount of any loss or damage sustained or incurred by ITRC as a consequence of such termination.

- 18.3 Subject to any other express provisions of this Contract, either party shall have the right to terminate the Contract if the other party commits any fundamental breach of any term of this Contract and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from the innocent party so to do, to remedy the breach, such request to contain a warning of the innocent party's intention to terminate.

19. Effect of Termination

- 19.1 Any termination of this Contract (howsoever occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.
- 19.2 Upon any termination of this Contract or any part thereof (howsoever occasioned) the Supplier shall forthwith deliver on ITRC's request to the ITRC all specifications, programs (including the Source Code of Custom Programs, object and command codes), test results, other drafts and documentation and operating manuals including but not limited to those relating to the preparation and writing of the Custom Programs and the Documentation existing at the date of such termination whether or not the same shall be completed. In the event of such delivery, all property rights including without limitation all Intellectual Property Rights in the aforesaid materials shall forthwith automatically pass to the ITRC (if not already passed to ITRC previously in accordance with the terms hereof) who shall be entitled to enter any premises of the Supplier for the purpose of taking possession of such materials and so that the Supplier hereby irrevocably licenses ITRC, its employees and agents to enter any such premises for such purpose. The Supplier shall also provide a briefing to ITRC on such Documentation and such materials delivered including the system design. For the avoidance of doubt ITRC shall be entitled to (but without any obligation to do so) to engage another Supplier to continue and complete the work using such documentation and materials.
- 19.3 Without prejudice, upon any termination of this Contract or any part thereof (howsoever occasioned), the Supplier shall forthwith deliver to ITRC all copies of any information and data supplied, made available or communicated to the Supplier by ITRC for the purpose of or in the course of performing this Contract including without limitation and shall certify to ITRC that no copies of such information or data have been retained.
- 19.4 Upon any termination (howsoever occurred) of this Contract or any part thereof the Supplier shall at its own costs and expense:-
- 19.4.1 Assign or novate, insofar as the Supplier has the right to do so, all sub-contracts and licences of Intellectual Property Rights, and any other contracts which are necessary for the performance and/or completion of this Contract by ITRC or at ITRC's discretion by a new Supplier/Suppliers nominated by ITRC.
- 19.4.2 In the event that the Supplier does not have the right to assign or novate such sub-contracts licences or such other contracts the Supplier shall use its reasonable endeavours to procure the assignment or novation of sub-contracts licences and contracts for the benefits of ITRC.

20. Service of Notice

All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this Contract or such other address as the recipient may designate by notice given in accordance with the provisions of this Clause. Any such notice may be delivered by hand or by pre-paid letter or facsimile or e-mail and shall be deemed to have been served by hand when delivered, if by post 48 hours after posting and if by facsimile or e-mail when despatched.

21. Disputes Resolution

Any dispute or difference arising out of or in connection with this Contract shall be conclusively referred to and determined by arbitration at the Hong Kong International Arbitration Centre and in accordance with its Domestic Arbitration Rules and be governed by the laws of HKSAR.

22. Waiver

No forbearance, delay or indulgence by either party in enforcing the provisions of this Contract shall prejudice or restrict the rights of that party nor shall any waiver of its rights operate as a waiver of any subsequent breach and no right, power or remedy herein conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party and each such right, power or remedy shall be cumulative.

23. Severability

In the event that any condition or clause of this Contract not being of a fundamental nature is held to be illegal or unenforceable, the validity or enforceability of the remainder of this Contract shall not be affected thereby.

24. Entire Agreement

This Contract supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the subject matter hereof. No addition to or modification of any provision of this Contract shall be binding upon the parties unless made by a written instrument signed by a duly authorised representative of each of the parties.

25. Software Asset Management

- 25.1 The Supplier shall at all times during the subsistence of this Contract exercise due diligence in software asset management and as and when required by the ITRC, furnish to the ITRC satisfactory evidence has been complied with.

- 25.2 The Supplier warrants and undertakes that the use of any software by the Supplier for the purpose of or otherwise in connection with the performance of this Contract shall not infringe any Intellectual Property Rights (including without limitation any patent, copyright, design or trademark) of any third party.
- 25.3 The Supplier shall notify the ITRC immediately in writing of any allegations, claims, action and/or proceedings in respect of such infringement and any progress thereof from time to time.
- 25.4 If the Supplier's use of the software for the purpose of or otherwise in connection with the performance of this Contract is held by a court to constitute an infringement of a third party's Intellectual Property Rights (including without limitation any patent, copyright, registered design or trademark), ITRC may terminate this Contract forthwith by giving notice in writing to the Supplier and recover from the Supplier the amount of any loss or damage sustained or incurred by ITRC as a consequence of such termination.

26. Execution of Further Documents

The Supplier shall at its own costs and expense do and execute any further things and document(s) (or procure that the same be done or executed) as may be required by ITRC.